5

No. 06-241

Supreme Court, U.S.
FILED
NOV 27 2006
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

Roya Rahmani *et al.*,

Petitioners,

v.

United States of America.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF *AMICI CURIAE* CONGRESSMEN BOB FILNER AND TOM TANCREDO, ON BEHALF OF THE IRAN HUMAN RIGHTS AND DEMOCRACY CAUCUS OF THE U.S. HOUSE OF REPRESENTATIVES, IN SUPPORT OF PETITIONERS

Pamela S. Karlan
Jeffrey L. Fisher
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Amy Howe
(Counsel of Record)
Kevin K. Russell
HOWE & RUSSELL, P.C.
4607 Asbury Pl., NW
Washington, DC 20016
(202) 237-7543

November 27, 2006

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

TABLE OF CONTENTS

INTEREST OF THE *AMICI* 1
ARGUMENT 3
I. Congress Intended, and the Executive Branch Agreed, That the FTO Designation Process Be Apolitical and Strictly Guided by the Statutory Criteria 3
II. Contrary to Congress's Intent, the Designation of the MEK Was Driven by Politics. 9
III. The MEK Is a Legitimate Political Organization Whose Supporters Should Not Be Prosecuted 15
CONCLUSION 17

TABLE OF AUTHORITIES

Cases

Freedman v. Maryland, 380 U.S. 51 (1965) 3
McKinney v. Alabama, 424 U.S. 669 (1976) 3

Statutes

8 U.S.C. § 1182(a)(3)(B) 14, 15
8 U.S.C. § 1182(a)(3)(B)(ii) 6
8 U.S.C. § 1182(a)(3)(B)(iii) 4, 6
8 U.S.C. § 1189 2
8 U.S.C. § 1189(c)(2) 4, 6
18 U.S.C. § 2339B 2
Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132 ..... passim
USA PATRIOT Act of 2001, Pub. L. No. 107-56 2

Other Authorities

141 Cong. Rec. S7479 (daily ed. May 25, 1995) 4
142 Cong. Rec. E592 (daily ed. Apr. 19, 1996) 4
142 Cong. Rec. H2129 (daily ed. Mar. 13, 1996) 9
142 Cong. Rec. H3605 (daily ed. Apr. 18, 1996) 7
142 Cong. Rec. S3454 (daily ed. Apr. 17, 1996) 5, 9
Najmeh Bozorgmehr et al., *Iran Alleged to Have Obtained N-Bomb Plans*, FINANCIAL TIMES, Nov. 18, 2004, at 7 15
DAVID COLE & JAMES X. DEMPSEY, TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY (3d ed. 2006) 7
Robert Collier, *Exonerated in Terror Case, 4 Brothers Still Locked Up*, S.F. CHRON., Jan. 25, 2005, at A1 ..11, 12, 15
Comprehensive Terrorism Prevention Act of 1995: Hearing on the Constitutionality of S. 390 and S. 735 Before the Senate Comm. on the Judiciary, Subcomm. on Terrorism, Tech., and Gov't, 104th Cong. (1995). 6, 7, 8, 9

Council on Foreign Relations Panel, The Relationship Between the U.S. and Iran, FED. NEWS SERV., Jan. 12, 2005 10

Robert Dreyfuss, *Colin Powell's List: The Targeting of "Terrorist" Groups Harks Back to Earlier Repression of Dissent*, THE NATION, Mar. 25, 2002, at 16 14

Georgetown Univ. & Iran Pol'y Cmte., *Mujahidin-e Khalq Organization (MEK)*, *available at* www.ict.org.il/inter_ter/ orgdet.cfm?orgid=24 ..... 3, 15, 16

H.R. Conf. Rep. No. 104-383 (1995)..... 1, 7, 8, 14

IRAN POL'Y COMM., U.S. POLICY OPTIONS FOR IRAN (2005), *reprinted in* 151 CONG. REC. E789 (daily ed. Apr. 27, 2005)..... 10

Douglas Jehl, *U.S. Sees No Basis to Prosecute Iranian Opposition "Terror" Group Being Held in Iraq*, N.Y. TIMES, Jul. 27, 2004, at A8..... 16

Norman Kempster, *U.S. Designates 30 Groups as Terrorists*, L.A. TIMES, Oct. 9, 1997, at A16..... 12

Letter from Gary L. Ackerman, Member, House of Reps., & Ileana Ros-Lehtinen, Member, House of Reps., to Madeleine Albright, Sec'y of State (May 7, 1999) 12

James Morrison, *Embassy Row: Backing Resistance*, WASH. TIMES, July 27, 2006, at A14..... 11

NCRI Platform, *reprinted in* WASH. POST, Oct. 9, 2002..... 15

Anne-Marie O'Connor et al., *L.A. Is a Den of Iranian Intrigue and Ambition*, L.A. TIMES, Mar. 20, 2005, at A1 15

OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, U.S. DEP'T OF STATE, 1995 PATTERNS OF GLOBAL TERRORISM (1996), *available at* http://dosfan.lib.uic.edu/ERC/arms/PGT_report/ 1995PGT.html 10

OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, U.S. DEP'T OF STATE, COUNTRY REPS. ON TERRORISM (Apr. 28, 2006) 12

OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, U.S. DEP'T OF STATE, FOREIGN TERRORIST ORGANIZATIONS, DESIGNATIONS BY THE SEC'Y OF STATE (Oct. 8, 1999), *available at* http://www.state.gov/s/ct/rls/rpt/fto/2682.htm 13

Parliamentary News, PRESS ASS'N NEWSFILE, Feb. 1, 2006 ..... 11, 16

Leanne Piggott, Editorial, *The Sensible Option on Iran*, THE AUSTRALIAN, Jan. 19, 2006, at 10 11

Reviewing the State Department's Annual Report on Terrorism: Hearing Before the House Subcomm. on Int'l Terrorism and Nonproliferation of the House Comm. on Int'l Relations, 109th Cong. (2006) 12

Nick Timiraos, *Iranian Americans Rally for a Different Approach*, L.A. TIMES, Jan. 20, 2006, at A13 14

U.S. Congress, Iran Statement (Nov. 2002) 10, 12

U.S. Congress, Policy Statement on Iran (Aug. 2001) 12

U.S. Congress, Statement on Iran's Deeds (Sept. 1998) 9, 11, 12, 16

U.S. Congress, Statement on Iranian Policy (June 2000) 12

INTEREST OF THE *AMICI*[1]

Amici Bob Filner and Tom Tancredo are members of the U.S. House of Representatives. Rep. Filner has represented California's fifty-first congressional district since 1992. Rep. Tancredo has represented Colorado's sixth congressional district since 1998. Like all members of Congress, both representatives share a strong interest in the proper interpretation and application of statutes enacted by Congress, as well as in the protection of the constitutional rights of all Americans.

Reps. Filner and Tancredo submit this brief not only as *amici curiae* in their own right, but also on behalf of the Iran Human Rights and Democracy Caucus of the U.S. House of Representatives, for which they currently serve as co-chairs.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

1. Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, following a series of deadly terrorist attacks that collectively claimed the lives of 363 Americans. Intending the legislation to serve as a broad response to the threat posed by terrorism, Congress included in AEDPA a wide range of provisions ranging from new immigration rules to restrictions on the acquisition of biological and chemical weapons and plastic explosives to increased funding for law enforcement agencies. Congress regarded these measures as "the tools necessary to prevent and punish criminal terrorist enterprises" and, thus, as essential to combating the rising tide of terrorism. *See* H.R. Conf. Rep. No. 104-383, at 38 (1995).

---

[1] No person other than the *amici* and their counsel participated in the writing of this brief or made a financial contribution to the brief. Letters signifying the parties' consent to the filing of this brief are on file with the Court.

Congress also enacted as part of AEDPA the "material support" provision at issue in this case. Designed to prohibit foreign terrorist organizations from raising money within the United States, the provision made it a federal crime, punishable by up to ten years[2] in prison, for Americans to provide "material support" – including the solicitation of financial contributions – to groups designated by the Secretary of State as "Foreign Terrorist Organizations" (FTOs). *See* Pub. L. No. 104-132, §§ 302(a), 303(a) (1996) (adding 8 U.S.C. § 1189 and 18 U.S.C. § 2339B).

2. The material support provision was one of several highly controversial portions of the Act which garnered considerable attention as a potential threat to protected civil liberties. In particular, Congress recognized that the material support provision could restrict the exercise of First Amendment rights. In response to these concerns, Congress made clear – and the executive branch agreed – that the Secretary of State should carry out the FTO designation process in a viewpoint-neutral and apolitical manner, and in strict accordance with the statutory criteria. Based on this understanding, and in light of the overwhelming importance of AEDPA generally in fighting terrorism, Congress passed the Act despite its misgivings regarding its possible impact on the exercise of constitutional rights.

3. The First Amendment does not protect an individual's right to donate money to actual terrorist organizations. As the petition for certiorari in this case demonstrates, however, serious First Amendment difficulties arise when the material support provision both prohibits a criminal defendant from demonstrating that an organization was improperly designated as a "foreign terrorist organization" and lacks even minimal procedural safeguards for challenging the designation

---

[2] Congress subsequently amended the statute to make material support of an FTO punishable by up to fifteen years' imprisonment. The USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 810(d) (2001).

generally. *See McKinney v. Alabama*, 424 U.S. 669 (1976); *Freedman v. Maryland*, 380 U.S. 51 (1965). In the view of *amici*, these difficulties become even more disturbing when, contrary to Congress's intent, the designation process operates so that First Amendment rights are restricted under the material support provision not because the designated organization actually meets the statutory criteria for designation, but instead based on the viewpoints espoused by that organization and the vagaries of political expediency. Such selective designations strip individuals of their constitutionally protected right to support disfavored groups.

Petitioners' case presents precisely such a disturbing scenario. Although Congress made clear that the designation process was intended to be viewpoint neutral, the process in this case was instead driven by politics. The Mujahedin-e Khalq (MEK)[3] was thus designated as an FTO notwithstanding that – as members of Congress have repeatedly reiterated – the organization is a legitimate political opposition group that Americans should be able to freely and openly support.

ARGUMENT

I. Congress Intended, and the Executive Branch Agreed, That the FTO Designation Process Be Apolitical and Strictly Guided by the Statutory Criteria.

In enacting AEDPA, Congress debated at great length whether the legislation, and the material support provision in particular, stretched too far in restricting personal freedoms in the name of national security. In those debates, Congress

---

[3] The MEK is also commonly known as the People's Mojahedin of Iran (PMOI). See Pet. for Cert. 6. It is a member of the umbrella coalition of the National Council of Resistance of Iran (NCRI). *See* Georgetown Univ. & Iran Pol'y Cmte., *Mujahidin-e Khalq Organization (MEK)*, *available at* www.ict.org.il/inter_ter/orgdet.cfm?orgid=24.

made clear that it intended FTO designations to be made by the Secretary of State in a viewpoint-neutral and apolitical manner. Anything short of that, Congress believed, would raise serious constitutional concerns, particularly with respect to First Amendment rights of free speech and association. In congressional hearings, however, the executive branch dismissed Congress's fear that the statute might be used for political ends as hypothetical and improbable. Thus assured, Congress passed the Act despite its serious concerns that improperly guided designations would unconstitutionally suppress free and open expression.

1. Prior to AEDPA's enactment, members of Congress on both sides of the aisle and in both Houses acknowledged that responding to terrorism "carries with it the grave risk of impinging on" civil liberties, including freedom of speech. 141 Cong. Rec. S7479-03, at *S7479 (daily ed. May 25, 1995) (statement of Sen. Hatch). As such, they were concerned that some of AEDPA's antiterrorism measures might not "achieve an appropriate balance between our desire to take action against terrorist acts and our desire to protect the fundamental civil rights of all Americans." 142 Cong. Rec. E592-02, at *E592 (daily ed. Apr. 19, 1996) (statement of Rep. Stokes).

2. While strongly believing that "nothing in the Constitution provides the right to engage in violence against fellow citizens" or to "[finance] terrorist bombings," 141 Cong. Rec. S7479-03, at *S7480 (daily ed. May 25, 1995) (statement of Sen. Hatch), members of Congress were especially concerned about the possibility that, as a result of AEDPA's extraordinarily broad definitions of "terrorist activity"[4] and "national security"[5] (which, as discussed *infra*

---

[4] The term "terrorist activity" is defined as

> any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of

at 10-11 and 14, could encompass both groups that have renounced violence and groups with no alternative other than to resort to armed resistance), the material support provision would restrict the exercise of First Amendment rights, *see* 142 Cong. Rec. S3454-01, at *S3473 (daily ed. Apr. 17, 1996) (statement of Sen. Specter) ("I am [] concerned about the first amendment implications of this provision, restricting the ability of US citizens to support favored causes.");

> the United States or any State) and which involves any of the following:
>
> (I) The highjacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).
> (II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.
>
> (III) A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of title 18, United States Code) or upon the liberty of such a person.
>
> (IV) An assassination.
>
> (V) The use of any--
>
> (a) biological agent, chemical agent, or nuclear weapon or device, or
>
> (b) explosive or firearm (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.
>
> (VI) A threat, attempt, or conspiracy to do any of the foregoing.

8 U.S.C. § 1182(a)(3)(B)(iii).

[5] The term "national security" is defined as "the national defense, foreign relations, or economic interests of the United States."

8 U.S.C. § 1189(c)(2) (as effective Sept. 30, 1996 to Oct. 20, 2001).

Comprehensive Terrorism Prevention Act of 1995: Hearing on the Constitutionality of S. 390 and S. 735 Before the Senate Comm. on the Judiciary, Subcomm. on Terrorism, Tech., and Gov't, 104th Cong. (1995) (statement of Sen. Specter, Chairman, Senate Subcomm. on Terrorism, Tech., and Gov't) (addressing concern that material support provision might "violate the first amendment rights of Americans to support certain organizations that do not engage in criminal acts" in the U.S.). For example, pursuant to these definitions, an organization could be designated as an FTO based only on the use or even the *threatened* use of any explosive or firearm with intent "to cause substantial damage to property," 8 U.S.C. § 1182(a)(3)(B)(ii) (as effective Oct. 30, 2000 to Oct. 25, 2001),[6] contrary to the "economic interests of the United States," *id.* § 1189(c)(2) (as effective Sept. 30, 1996 to Oct. 20, 2001).[7]

First, Congress heard testimony warning that although the material support provisions were targeted at curbing fundraising by genuine terrorist organizations, AEDPA's broad definition of "terrorist activity" was likely to have a "chilling effect on humanitarian and philanthropic fundraising in the United States" generally, by prompting would-be donors to forgo contributions to legitimate organizations to avoid the prospect of criminal liability. *Comprehensive*

---

[6] The current version of 8 U.S.C. § 1182(a)(3)(B)(iii) sweeps even more broadly. It would permit an organization to be designated as an FTO based on the threatened or attempted use of any "weapon or dangerous device," such as a knife or blunt object.

[7] Indeed, one commentator noted that because of AEDPA's broad definitions, the material support provision could encompass "tens of thousands of potential organizations, and hundreds of thousands of affiliated organizations and persons." *Comprehensive Terrorism Prevention Act of 1995: Hearing on the Constitutionality of S. 390 and S. 735 Before the Senate Comm. on the Judiciary, Subcomm. on Terrorism, Tech., and Gov't*, 104th Cong. (1995) (statement of David Cole, Professor, Georgetown University Law Center).

Terrorism Prevention Act of 1995: Hearing on the Constitutionality of S. 390 and S. 735 Before the Senate Comm. on the Judiciary, Subcomm. on Terrorism, Tech., and Gov't, 104th Cong. (1995) (statement of Khalil E. Jahshan, Executive Director, Nat'l Ass'n of Arab Americans); *see also* 142 Cong. Rec. H3605, at *H3614 (daily ed. Apr. 18, 1996) (statement of Rep. Jackson Lee) (noting that "false accusations against certain groups" would result in a "chilling effect" on First Amendment rights).

Second, and even more significantly, members of Congress were concerned that the combination of AEDPA's broad definition of "terrorist activity" and the discretion accorded to the executive branch in designating an organization as an FTO would exacerbate the First Amendment problems already inherent in the material support provision by opening up the designation process to manipulation for political purposes: "Given the bill's broad definition of 'terrorism,' as a practical matter this will give the Secretary of State completely open-ended authority to determine which organizations to blacklist. This could very well lead to the law being applied in a selective manner . . . ." H.R. Rep. No. 104-383, at *180 (1995) ("Dissenting Views"). They cautioned that this "unfettered executive power," *Comprehensive Terrorism Prevention Act of 1995: Hearing on the Constitutionality of S. 390 and S. 735 Before the Senate Comm. on the Judiciary, Subcomm. on Terrorism, Tech., and Gov't*, 104th Cong. (1995) (statement of Sen. Specter, Chairman, Senate Subcomm. on Terrorism, Tech., and Gov't) (citing concern held by members of Congress), would allow the Department of State to single out disfavored political groups "based on the politics of the moment," DAVID COLE & JAMES X. DEMPSEY, TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY 139 (3d ed. 2006).

3. To assuage its concerns that the material support provision might be used selectively to silence support for disfavored groups, Congress made clear that the designation

process was to be carried out in strict accordance with the statutory criteria, with no consideration paid to a group's political viewpoint. The House Report on the bill thus emphasized that the fundraising prohibition established by the material support provision "is not based upon the message or opinions espoused by a particular organization. Rather, the criminal prohibition is based on the documented illegal acts of that organization." H.R. Rep. No. 104-383, at *44 (1995). Moreover, Congress explained, the fundraising prohibition should be "applie[d] uniformly and equally to all persons within the United States, regardless of political, philosophical, or religious affiliation." *Id.* at *45. While acknowledging that it would be impractical to designate each and every group engaging in terrorist activities, Congress "anticipated that the Secretary of State [would] be . . . exhaustive in his or her designation of terrorist groups." *Id.* at *81.

4. For its part, the executive branch "acknowledge[d] . . . [the] legitimate concerns" raised by members of Congress regarding the constitutionality of the material support provision. *Comprehensive Terrorism Prevention Act of 1995: Hearing on the Constitutionality of S. 390 and S. 735 Before the Senate Comm. on the Judiciary, Subcomm. on Terrorism, Tech., and Gov't*, 104th Cong. (1995) (statement of Teresa Roseborough, Deputy Asst. Att'y Gen., Dep't of Justice). It took pains, however, to dismiss such concerns as unfounded, noting observations by the provision's critics that the "First Amendment issues would be largely academic if it could be assumed that [material support provision] would be narrowly applied only against genuine terrorist organizations." *Id.* "In that respect," the Department of Justice continued, "the constitutional criticisms are primarily based upon hypothetical misapplications of the legislation rather than facial constitutional flaws." *Id.*

The executive branch thus made clear that it agreed with Congress's understanding of the material support provision and assured Congress that it would carry out the FTO designation process in a viewpoint-neutral and apolitical

manner. Specifically, it emphasized that the arguments against the material support provisions rested on the premise that the executive branch "would abuse [its] power to designate terrorist organizations in order to thwart First Amendment rights" – a premise that it rejected. *Id.*

5. Armed with these assurances from the executive branch that the designation process would be carried out in a viewpoint-neutral manner and in accordance with the statutory criteria, Congress enacted AEDPA despite its misgivings about the threat that the material support provisions posed to the civil liberties of law-abiding Americans. In so doing, it emphasized both that "the United States is a fertile ground for financial support for foreign terrorist organizations," 142 Cong. Rec. S3454-01, at *S3473 (daily ed. Apr. 17, 1996) (statement of Sen. Specter), such that the material support provision was necessary to cut off fundraising in the United States for genuine terrorist organizations, and that, "on balance," any misgivings about possible First Amendment concerns were outweighed by the "very, very important" contribution that AEDPA would make to the fight against terror. *Id.* at *S3470; *see also* 142 Cong. Rec. H2129-05 (daily ed. Mar. 13, 1996) (statement of Rep. Nadler) (agreeing with other members of Congress that the provision raised serious First Amendment concerns, but emphasizing that without such a provision, the U.S. would "have no prohibition that can be enforced against the funding from the United States of terrorist organizations").

II. Contrary to Congress's Intent, the Designation of the MEK Was Driven by Politics.

In 1997, the Department of State designated the MEK as an FTO. Because – as members of Congress have repeatedly reiterated – the MEK is "a legitimate opposition to the Iranian regime," *see* U.S. Congress, Statement on Iran's Deeds (Sept. 1998) (signed by 220 members of the House of Representatives), and because the designation process relied (as is widely acknowledged) on political expediency rather

than the statutory criteria, the designation was "in direct contradiction with the spirit of the [AEDPA] and congressional intent in drafting the law," *see* U.S. Congress, Iran Statement (Nov. 2002) (signed by 150 members of the House of Representatives).

1. The MEK is the primary opposition group in Iran, which is currently governed by a regime described by the U.S. as part of an "axis of evil" and one of the world's primary state sponsors of terror. Much of the criticism leveled at the MEK derives from its alleged attacks in the 1970s on U.S. security advisors to the Shah of Iran, whom the MEK regarded as corrupt and repressive and thus sought to unseat. The group is also frequently accused of having supported the takeover of the U.S. Embassy by Muslim students in 1979. Although the MEK has denied both sets of allegations, *see* IRAN POL'Y COMM., U.S. POLICY OPTIONS FOR IRAN 17-18 (2005), *reprinted in* 151 CONG. REC. E789-02, *E793 (daily ed. Apr. 27, 2005) (statement of Rep. Filner), it is undisputed that the MEK has not targeted U.S. interests in the years since 1979.

Although the MEK's detractors also criticize the group's past use of armed resistance against Iran, even the Department of State recognizes that the MEK, as Iran's leading political opposition group, has borne the brunt of Tehran's efforts to exterminate internal political dissent, *see* OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, U.S. DEP'T OF STATE, 1995 PATTERNS OF GLOBAL TERRORISM (1996), *available at* http://dosfan.lib.uic.edu/ERC/arms/PGT_report/ 1995PGT.html; indeed, Iran's security forces are believed to have executed as many as one hundred thousand MEK members and supporters, *see* U.S. Congress, Iran Statement (Nov. 2002) (signed by 150 members of Congress); *see also Council on Foreign Relations Panel, The Relationship Between the U.S. and Iran*, FED. NEWS SERV., Jan. 12, 2005 (statement of Mark Palmer, Capital Development Co.). Viewed in this context, the MEK's past use of armed resistance places the group in the company of

other resistance groups – such as the Northern Alliance in Taliban-controlled Afghanistan, the African National Congress (ANC) in apartheid-era South Africa, and Jewish armed resistance groups in Nazi-controlled Europe – that have had no other recourse but to use armed tactics as non-state parties to a conflict.

2. As has been widely recognized,[8] the Department of State capitalized on the MEK's controversial status and designated the organization as an FTO to further its political agenda. In May 1997, Iran elected Mohammad Khatami, a reform-minded political moderate, as President. The U.S. regarded the change in leadership as an opportunity to reopen dialogue with Iran. As the group that the Iranian regime viewed as its most serious internal threat, Robert Collier, *Exonerated in Terror Case, 4 Brothers Still Locked Up*, S.F. CHRON., Jan. 25, 2005, at A1, the MEK was a natural pawn, and Iran reportedly demanded the designation as a prerequisite for engaging in diplomatic talks with the U.S., *see* James Morrison, *Embassy Row: Backing Resistance*, WASH. TIMES, July 27, 2006, at A14. In October 1997, the State Department complied with Iran's demand and included the MEK on a list of designated FTOs. Shortly thereafter, a senior Clinton administration official indicated that the designation was intended as a "goodwill gesture" to Khatami and the Iranian regime. Norman Kempster, *U.S. Designates*

---

[8] *See, e.g.*, U.S. Congress, Statement on Iran's Deeds (Sept. 1998) (signed by 220 members of the House of Representatives); IRAN POL'Y COMM., U.S. POLICY OPTIONS FOR IRAN 17-18 (2005), *reprinted in* 151 CONG. REC. E789-02, *E793 (daily ed. Apr. 27, 2005) (statement of Rep. Filner); Robert Collier, *Exonerated in Terror Case, 4 Brothers Still Locked Up*, S.F. CHRON., Jan. 25, 2005, at A1; Leanne Piggott, Editorial, *The Sensible Option on Iran*, THE AUSTRALIAN, Jan. 19, 2006, at 10; Parliamentary News, PRESS ASS'N NEWSFILE, Feb. 1, 2006 (citing Andrew Mackinlay, Member of the U.K. Parliament for Thurrock).

30 Groups as Terrorists, L.A. TIMES, Oct. 9, 1997, at A16. Former Clinton administration officials have subsequently confirmed that the designation was aimed at bolstering support for Khatami, who faced strong opposition from the religious old guard within Tehran. Robert Collier, *Exonerated in Terror Cases, 4 Brothers Still Locked Up*, S.F. CHRON., Jan. 25, 2005, at A1.

3. That the designation of the MEK was and continues to be politically motivated is further confirmed by the Secretary of State's failure to revoke the designation despite increasingly clear evidence that there is no basis for it. In 2001, the MEK explicitly renounced the use of violence and has not engaged in attacks in Iran or elsewhere since – a fact that even the State Department's Country Reports on Terrorism, which purportedly serve as the unclassified basis for FTO designations, effectively concede. *See* OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, U.S. DEP'T OF STATE, COUNTRY REPS. ON TERRORISM (Apr. 28, 2006), *available at* http://www.state.gov/s/ct/rls/crt/2005/65275.htm (failing to cite any violent or terrorist actions taken by the group after 2001 and acknowledging that "MEK terrorism in Iran declined toward the end of 2001"). Despite the MEK's renunciation of violence, as well as repeated urgings by members of Congress to revisit the issue,[9] the Secretary has

---

[9] *See, e.g.*, *Reviewing the State Department's Annual Report on Terrorism: Hearing Before the House Subcomm. on Int'l Terrorism and Nonproliferation of the House Comm. on Int'l Relations*, 109th Cong. 30-31 (2006) (noting that the MEK has not engaged in any terrorism for several years and "urg[ing] the State Department to provide a road map to those organizations on the terrorist list that would like to get off, particularly those . . . that do not threaten Americans, and in particular . . . the MEK") (statement of Rep. Brad Sherman, Member, House Comm. on Int'l Relations); U.S. Congress, Iran Statement (Nov. 2002) (expressing concern that "the holdover designation will cause unnecessary harm and will undermine the efforts of those legitimately working to establish democracy in Iran") (signed by 150 members of the

refused to revoke the designation. By contrast, other groups have been removed from the FTO list after refraining from violence for far shorter periods of time. *See, e.g.*, OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, U.S. DEP'T OF STATE, FOREIGN TERRORIST ORGANIZATIONS, DESIGNATIONS BY THE SEC'Y OF STATE (Oct. 8, 1999), *available at* http://www.state.gov/s/ct/rls/rpt/fto/2682.htm (removing the Manuel Rodriguez Patriotic Front Dissidents and the Democratic Front for the Liberation of Palestine from FTO list "primarily because of the absence of terrorist activity, as defined by relevant law, by those groups during the past two years").

Instead, the same political considerations that drove the MEK's original designation as an FTO – *i.e.*, a desire to improve its relationship with the Iranian regime – appear to be responsible for the Secretary's failure to revoke the designation. Thus, for example, when asked in 2000 why the NCRI was added to the list of MEK aliases, a senior State Department official explained, "[t]he Iranian government had brought this to our attention." Robert Dreyfuss, *Colin Powell's List: The Targeting of "Terrorist" Groups Harks*

House of Representatives); U.S. Congress, Policy Statement on Iran (Aug. 2001) (urging the U.S. to support the democratic goals of the NCRI) (signed by 32 members of the U.S. Senate); U.S. Congress, Statement on Iranian Policy (June 2000) (reaffirming commitment to ideas expressed in 1998 and 1999 congressional statements) (signed by 228 members of the House of Representatives); Letter from Gary L. Ackerman, Member, House of Reps., & Ileana Ros-Lehtinen, Member, House of Reps., to Madeleine Albright, Sec'y of State (May 7, 1999) (reaffirming commitment to 1998 "Statement on Iran's Deeds"); U.S. Congress, Statement on Iran's Deeds (Sept. 1998) ("This designation is indeed a wrong-headed approach, and appears to directly contradict at least the spirit of the anti-terrorism law, and *we believe the decision [to designate the MEK] should be reviewed immediately.*") (signed by 220 members of the House of Representatives) (emphasis added).

Back to Earlier Repression of Dissent, THE NATION, Mar. 25, 2002, at 16.

4. Selective designations like the one at issue here can have widespread ramifications. Allowing the executive branch to selectively designate legitimate political opposition groups as foreign terrorist organizations strips individuals of their constitutionally protected right to support disfavored political groups. Indeed, taken to the extreme, the statute would allow the executive branch to effectively proscribe the right to donate to *any* opposition or resistance group that has *ever* engaged in activities falling within Section 1182(a)(3)(B)'s scope, even if the group at issue has subsequently renounced violence. In the debate over AEDPA, members of Congress warned of precisely this possibility, noting that the designation process would "arbitrarily limit donations to entities which have completely altered their purposes and functions – such as the African National Committee [sic] – since the terrorist designation could apply to any foreign organization which has at any time in the past engaged in 'terrorist' activity." H.R. Rep. No. 104-383, at 179 (1996) ("Dissenting Views").

For many immigrant Americans and asylees living in the U.S., the impact of selective designations can be particularly harsh insofar as the causes advanced by political opposition groups abroad are often part and parcel of their most strongly held political beliefs. "When Iranians see their largest resistance group being rejected by the U.S., they are demoralized," says one Iranian-American who supports the MEK. Nick Timiraos, *Iranian Americans Rally for a Different Approach*, L.A. TIMES, Jan. 20, 2006, at A13. Particularly with respect to immigrant communities, the statute also appears to be exerting precisely the kind of chilling effect that concerned Congress prior to the passage of AEDPA. In October 2001, for example, four Iranian-American brothers were detained under a related USA PATRIOT Act provision that renders membership in the MEK a deportable crime. Robert Collier, *Exonerated in*

Terror Cases, 4 Brothers Still Locked Up, S.F. CHRON., Jan. 25, 2005, at A1. As press accounts relate, their "chief offense appears to be that they once attended a rally in support of the . . . MEK." *Id.* The brothers were eventually exonerated and released, but only after spending nearly three-and-a-half years in prison. Anne-Marie O'Connor et al., *L.A. Is a Den of Iranian Intrigue and Ambition*, L.A. TIMES, Mar. 20, 2005, at A1.

III. The MEK Is a Legitimate Political Organization Whose Supporters Should Not Be Prosecuted.

1. As the petition for certiorari illustrates, Pet. for Cert., No. 06-241, *Rahmani v. United States* 6-7, the MEK is a legitimate political resistance movement that seeks a transition from the current theocratic regime to a secular democracy. The group also supports the Middle East peace process and endorses a free-market economy in Iran. NCRI Platform, *reprinted in* WASH. POST, Oct. 9, 2002. The MEK strongly supports equal rights for women, who constitute thirty percent of its members and who hold a disproportionate number of the group's leadership positions. *See* Georgetown Univ. & Iran Pol'y Comm., *Mujahidin-e Khalq Organization (MEK), at* www.ict.org.il/inter_ter/orgdet.cfm?orgid=24.

To achieve its goals, the MEK engages in political lobbying, education, counterintelligence, and charitable activities. The group is thus credited, for example, with bringing to light Iran's covert nuclear program in August 2002. Najmeh Bozorgmehr et al., *Iran Alleged to Have Obtained N-Bomb Plans*, FINANCIAL TIMES, Nov. 18, 2004, at 7. None of the MEK's current activities could be construed as terrorist activity, even under the exceptionally broad rubric of Section 1182(a)(3)(B). As the petition also notes, the U.S. government itself has corroborated this fact during its investigation of the MEK in Iraq, which found no basis on which to charge MEK members with violations of U.S. law. Douglas Jehl, *U.S. Sees No Basis to Prosecute Iranian*

Opposition "Terror" Group Being Held in Iraq, N.Y. TIMES, Jul. 27, 2004, at A8.[10]

2. In recognition of the legitimacy of the group's goals and activities, members of Congress have consistently endorsed the MEK and have strongly objected to its listing as a FTO. On at least five separate occasions since the MEK's designation in 1997, bipartisan groups from both Houses of Congress signed statements acknowledging the MEK's role as a genuine political resistance movement and voicing their strong disagreement with the Secretary of State's designation.[11] The 1998 statement, for example, specifically emphasized that "[i]t was not Congress' intent . . . that a legitimate opposition to the Iranian regime be included within that particular list of terrorist groups." U.S. Congress, Statement on Iran's Deeds (Sept. 1998) (signed by 220 members of the House of Representatives). Legislators in other countries have similarly expressed support for the MEK: earlier this year, 430 members of U.K. Parliament and peers (as well as 2000 U.K. lawyers) signed declarations asking the British government to reconsider its designation of the MEK as a terrorist organization. Parliamentary News, PRESS ASS'N NEWSFILE, Feb. 1, 2006.

* * * *

In enacting the material support provision, Congress sought to cut off contributions in the United States to genuine terrorist organizations – a right unquestionably excluded from First Amendment protection. In so doing, Congress expressly intended that the process used to designate terrorist

---

[10] Moreover, MEK members who were present in Iraq after the U.S. invasion were "granted . . . 'protected persons' status under the Fourth Geneva Convention in July 2004, treating them as noncombatants remaining in the aftermath of war." *See* Georgetown Univ. & Iran Pol'y Comm., *Mujahidin-e Khalq Organization (MEK)*, *available at* www.ict.org.il/inter_ter/orgdet.cfm?orgid=24.

[11] *See supra* note 9.

organizations subject to the material support provision would be viewpoint neutral, relying strictly on the statutory criteria. As this brief shows, however, the designation process has proven to be subject to precisely the manipulations that so concerned Congress prior to AEDPA's enactment, resulting in the improper designation of legitimate political organizations such as the MEK. For this reason, as the petition for certiorari demonstrates, it is essential that individual defendants, such as petitioners, charged with a criminal violation of the material support provisions have the right to challenge that designation.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, it is essential, for the material support provision to pass First Amendment muster, that individual defendants have an opportunity to demonstrate that the organization they have been charged with supporting was improperly designated as an FTO. Certiorari should thus be granted.

Respectfully submitted,

Pamela S. Karlan
Jeffrey L. Fisher
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Amy Howe
(Counsel of Record)
Kevin K. Russell
HOWE & RUSSELL, P.C.
4607 Asbury Pl., NW
Washington, DC 20016
(202) 237-7543

November 27, 2006